United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1906.

No. 1646.

LOUISA A. CROSBY, APPELLANT,

vs.

JOHN RIDOUT, CHARLES H. MERILLAT, TRUSTEE; ABBOT E. JONES AND ELIZABETH JONES, HIS WIFE; FRANK P. REESIDE, JOSEPH R. EDSON, CHARLES B. BAILEY, THE NATIONAL METROPOLITAN CITIZENS' BANK OF WASHINGTON, D. C., PERCIVAL M. BROWN, TRUSTEE, AND CHARLES W. CLAGETT, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 19, 1906.

In the Court of Appeals of the District of Columbia

LOUISA A. CROSBY, Appellant,
vs.
JOHN RIDOUT ET AL. } No. 1646.

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a Supreme Court of the District of Columbia.

LOUISA A. CROSBY, Complainant,
vs.
JOHN RIDOUT, CHARLES H. MERILLAT, Trustee; Abbot E. Jones and Elizabeth Jones, His Wife; Frank P. Reeside, Joseph R. Edson, Charles B. Bailey, The National Metropolitan Citizens' Bank of Washington, D. C., Percival M. Brown, Trustee, and Charles W. Clagett, Trustee, Defendants. } Equity. No. 25416.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Amended Bill of Complaint.*

Filed January 16, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

LOUISA A. CROSBY, Complainant,
vs.
JOHN RIDOUT, CHARLES H. MERILLAT, Trustee; Abbot E. Jones and Elizabeth Jones, His Wife; Frank P. Reeside, Joseph R. Edson, Charles B. Bailey, The National Metropolitan Citizens' Bank of Washington, D. C., Percival M. Brown, Trustee, and Charles W. Clagett, Trustee, Defendants. } Equity. No. 25416.

Amended Bill of Complaint Filed with Leave of Court First Obtained.

To the Honorable, the Justice holding said Court:

Your complainant, Louisa A. Crosby, states as follows:

1. That she is a citizen of the United States and a resident of the District of Columbia, and brings suit in her own right.

2. That the defendant, John Ridout, is a citizen of the United States and a resident of the District of Columbia, and is sued in his own right; that the defendant Charles H. Merillat, is a citizen of the United States and a resident of the District of Columbia, and is sued as Trustee in Bankruptcy of said John Ridout; that the defendant, Abbot E. Jones, is a citizen of the United States and a resident of the District of Columbia, and is sued in his own right; that the defendant, Elizabeth Jones, is a citizen of the United States and a resident of the District of Columbia, and is sued as the wife
2 of Abbott E. Jones; that the defendant, Frank P. Reeside, is a citizen of the United States and a resident of the District of Columbia, and is sued as Secretary of the Equitable Co-operative Building Association; that the defendant-, Joseph R. Edson and Charles B. Bailey, are citizens of the United States and residents of the District of Columbia, and are sued as Trustees under a certain Deed of Trust hereinafter set out; that the defendant, The National Metropolitan Citizens' Bank, of Washington, D. C., is a corporation organized and existing under and by virtue of the laws of the United States, is a citizen of the United States and a resident of the District of Columbia, and is sued in its own right and as successor to the Citizens' National Bank of Washington City, a corporation; that the defendants Percival M. Brown, and Charles W. Clagett Trustees, are citizens of the United States and residents of the District of Columbia, and are sued as Trustees under a certain deed hereinafter more particularly referred to.

3. Your complainant, avers that, to wit: in the month of January, 1899, she employed the defendant, John Ridout, at that time an attorney-at-law, engaged in the active practice of his profession in the City of Washington, District of Columbia, and then a member of the bar of the Supreme Court of the District of Columbia, to invest for her upon good real estate security the sum of fifteen hundred ($1500.00) dollars, and placed the said sum of money in his hands as her attorney to be invested as aforesaid; that, to wit, on the 12th day of January, 1899, the said John Ridout advised your complainant, that said sum of fifteen hundred ($1500.00) dollars so placed in his hands for investment, had been loaned to the defendant, Abbott E. Jones, secured by a deed of trust from said Jones and
3 Elizabeth Jones, his wife, on part of lot twelve (12) in square seven hundred and twenty-four (724) in the District of Columbia, which is hereinafter more fully described, and forwarded to your complainant a certain promissory note, dated the tenth of January, 1899, whereby five (5) years after date said Abbot E. Jones promised to pay to the order or your complainant fifteen hundred ($1500.00) dollars, with interest thereon at the rate of six (6 %) per cent. per annum, until paid, payable semi-annually, the said note purporting on its face to be secured by a deed of trust on part of lot twelve (12) in square seven hundred and twenty-four (724) to said John Ridout and Irving Williamson, Trustees; that at the same time said Ridout also forwarded to your complainant a receipt of the Recorder of Deeds of the District of Columbia for said deed of trust which had been filed with said Recorder of Deeds, to

be recorded among the land records of the District of Columbia; and also forwarded to your complainant a certificate of title made by said John Ridout as Attorney for your complainant, whereby he certified, over his signature, that the title to part of said lot twelve (12) in square seven hundred and twenty-four (724) in the City of Washington and District of Columbia hereinafter more fully described was good in said Abbot E. Jones, subject only to a deed of trust from said Jones and Elizabeth Jones, his wife, to said Ridout and Irving Williamson, as Trustees, to secure your complainant the said sum of fifteen hundred ($1500.00) dollars. That the interest on said promissory note has been regularly paid up to the tenth day of January, 1905, and that no interest has been paid thereon since that date.

4 4. Your complainant avers that on and before the said tenth day of January, 1899, and ever since said date, and up to the time of the appointment of a Trustee in Bankruptcy for the estate of said Ridout on, to wit, the twenty-fourth day of February, 1905, the record title to said part of original lot twelve (12) in said square seven hundred and twenty-four (724) in the City of Washington and District of Columbia, described as follows: to wit, beginning at a point on First street, east thirteen (13) feet eight and three-fourths (8¾) inches south from the northwest corner of said lot, thence south thirteen (13) feet six (6) inches, thence east one hundred and fifteen (115) feet to the rear line of said lot, thence north thirteen (13) feet, six (6) inches, and thence west one hundred and fifteen (115) feet, to the place of beginning, and also described as the thirteen (13) feet six (6) inches front by the full depth of lot next south of and adjoining the north thirteen (13) feet six (6) inches front of lot twelve (12) in square seven hundred and twenty-four (724), was in the said John Ridout; That since the appointment of Charles H. Merillat as Trustee in Bankruptcy for said John Ridout, said Merillat as such Trustee has been collecting the rents and profits from said real estate.

5. That to wit, on the tenth day of January, 1899, the defendant, Abbot E. Jones and Elizabeth Jones, his wife, executed a deed of trust, recorded by the procurement of said John Ridout on January eleventh, 1899, whereby they conveyed the thirteen (13) feet six (6) inches front by the full depth of the lot next south of and adjoining the north thirteen (13) feet six (6) inches front of lot twelve (12) square seven hundred and twenty-four (724), being the same real estate more particularly described in paragraph four hereof;

5 to John Ridout and Irving Williamson, Trustees, to secure your complainant the said sum of fifteen hundred ($1500.00) dollars, as evidenced by a promissory note of even date with said deed of trust, payable five (5) years after date to the order of your complainant, with interest at the rate of six (6 %) per cent. per annum, payable semi-annually; all of which will more fully appear by reference to said deed of Trust, duly recorded in Liber 2365, folio 338.

Your complainant avers upon information recently acquired and belief, that Abbot E. Jones and Elizabeth Jones, his wife, never had

any beneficial interest whatsoever in said real estate, although the said Jones held the legal title thereto, as is hereinafter set out; that they executed said deed of trust upon said real estate to secure your complainant as a matter of accom-odation to said Ridout. That the said fifteen hundred ($1500.00) dollars belonging to your complainant and placed in the hands of John Ridout for investment as aforesaid was retained by John Ridout, and that the interest paid upon such loan of fifteen hundred ($1500.00) dollars was paid to your complainant by said Ridout.

Your complainant avers that the real estate described in said deed of trust from Abbott E. Jones and Elizabeth Jones, his wife, to John Ridout and Irving Williamson, Trustees, is the same real estate hereinabove described as owned by John Ridout on and before the tenth day of January 1899.

6. Your complainant avers upon information that John Ridout and Frances E. Ridout, his wife, conveyed by a good and sufficient deed, the real estate hereinabove described, to the defendant, Abbott E. Jones, prior to the date of the deed of trust hereinabove described,

6 from Abbot E. Jones and wife to Ridout and Williamson, Trustees, to secure your complainant; that through some inadvertence or oversight said deed was not recorded; that

your complainant has made diligent inquiry to find said deed but without success, and has been advised by said Ridout that it was left in his possession for record, but has been lost or was destroyed by a fire which occurred in the Fendall Building in the City of Washington, where the said Ridout had his office, which fire destroyed many valuable papers in the posession of said Ridout.

7. Your complainant is advised and thereupon charges that the facts hereinabove set out create a lien upon said real estate in favor of your complainant, which a Court of equity will render certain.

8. Your complainant avers that there are two methods of searching titles of real estate in the District of Columbia; that one method is by examining the indexes of the land records of the District of Columbia by names and taking a list of all names and references affecting a certain piece of real estate and thereafter examining the deeds to which said names and references apply; that the other method of examination is by examining every conveyance affecting the particular lot of ground. Your complainant avers that any person upon examining the land records of the District of Columbia in either of the ways above pointed out, would have found recorded the above described deed of trust from Abbot E. Jones and wife to John Ridout and Irving Williamson, Trustees, and would have found that long prior to the date of said deed of trust the title to said real estate was in John Ridout, and would have found further that Abbot E. Jones had conveyed to John Ridout the property owned by John Ridout for the purpose of securing your complainant the said sum of fifteen hundred ($1500.00) dollars; that

7 all persons dealing with said real estate and all judgments and general creditors of the said John Ridout were bound to

know of and had notice of and were put on inquiry concerning the said interest of your complainant in said real estate, and are estopped

to deny that your complainant has a lien upon the said real estate superior to the liens or lien of all judgment creditors who have obtained judgments against said John Ridout since the said deed from Abbot E. Jones and wife, was recorded and superior to all claim, right, title, and interest of the general creditors of said John Ridout and of the said Trustee in Bankruptcy of John Ridout.

9. Your complainant avers that, to wit, on the sixteenth day of March, 1905, Irving Williamson and John Ridout, as Trustee, John Ridout in his own right, Frances E. Ridout, his wife, Abbot E. Jones and Elizabeth Jones, his wife, and Louisa A. Crosby joined in a deed whereby they conveyed the real estate hereinabove described to Charles W. Clagett and Percival M. Brown, Trustees, for the purpose of correcting certain omissions in the record occurring through inadvertence, and certain defects and imperfections in the title to the real estate hereinbefore described conveyed under the deed of trust hereinabove referred to from Abbot E. Jones and wife, to John Ridout and Irving Williamson, dated January 10, 1899, and recorded in Liber 2365 at folio 338 of the land records of the District of Columbia; that in said deed John Ridout and Irving Williamson resigned as Trustees under the said deed of trust from Abbot E. Jones, dated January 10, 1899, and Percival Brown and Charles W. Clagett were substituted as Trustees, the said real estate being con-
8 veyed to them under and upon the uses and trusts set forth in the deed of trust from the said Abbot E. Jones and wife, dated January 10, 1899, and recorded in said Liber 2365 and folio 338; that your complainant, Louisa A. Crosby, joined in said Deed solely for the purpose of consenting to the substitution of Trustees. That said conveyance to said Clagett and Brown, Trustees, vested in them for the benefit of your complainant the inchoate dower interest of Frances E. Ridout in the real estate hereinabove described.

10. Your complainant avers that by a deed of Trust dated October 22, 1890, and recorded on the same day in Liber 1533 folio 254, Charlotte E. Peach conveyed the real estate hereinbefore described to Joseph R. Edison and Charles B. Bailey, Trustees, to secure the Equitable Co-operative Building Association $20,000.00 (twenty thousand dollars) Your complainant avers upon information and belief that the said loan secured by said Deed of Trust has been paid; that the facts as to the amount, if any, due the said Building Association under said Trust is known to said defendants, Frank P. Reeside, Charles B. Bailey, and Joseph R. Edson, and ought to be disclosed by them, and that your complainant is unable to prove these facts by other testimony wherefore your complainant calls upon the said defendants, Reeside, Edson and Bailey, to discover whether or not the loan has been paid, and if not, the amount of money still due said Building Association under said Deed of Trust.

11. Your complainant avers that on, to wit, the 15th day of October, 1904, the Citizens National Bank of Washington City, a corporation, recovered a judgment in the Supreme Court of the District of Columbia against John Ridout for twenty-five hundred and

one dollars and eighty-seven cents ($2501.87), with interest
9 on twenty-five hundred dollars ($2500.00), from May 23, 1904, besides costs; that on, to wit, the 11th day of November, 1904, the said Bank recovered a judgment in the Supreme Court of the District of Columbia, against John Ridout for twenty-seven hundred and thirteen dollars and seventy-four cents ($2713.74) with interest on one hundred and forty ($140.00) dollars from February 1, 1904, on one hundred and seventy-four ($174.00) dollars from May 18, 1904, and on twenty-four hundred ($2400.00) dollars from June 3, 1904, at six (6%) per cent. per annum, besides costs. That in the month of October or November, 1904, the Citizens' National Bank, of Washington City was merged with the Metropolitan National Bank of Washington, and that the National Metropolitan Citizens' Bank of Washington, D. C., is the successor to the said Citizens' National Bank of Washington City; that as the successor of said Bank it owns all the assets of the Citizens' National Bank of Washington City, including the alleged judgments above referred to. That said judgments are subject and inferior to the lien of your complainant upon the real estate hereinabove described. That the said judgments in favor of said bank were recovered within four months prior to the adjudication of the said Ridout as a bankrupt, by the Supreme Court of the District of Columbia, holding a bankruptcy Court, and are void.

That writs of *fieri facias* issued on said judgments on the — day of ——, 190–, and were levied upon a large amount of real estate in this District at that time owned by said Ridout, which was of great value, but the real estate hereinabove described was not levied upon by said writs. That owing to the proceedings in said bankruptcy Court against said Ridout no further steps were taken to enforce said judgments.

10 Your complainant avers that if it should be held that the Trustee in Bankruptcy of said Ridout can avail himself of the liens of said judgments as against your complainant, then in that event your complainant is entitled to have all the real estate owned by said Ridout at the date of said judgments, and all the personal estate owned by him at the time the said writs of *fieri facias* were placed in the hands of the marshal for the District of Columbia, marshalled to ascertain the equitable proportion of said judgments which the real estate hereinabove described should bear.

The premises considered your complainant prays as follows:

1. That subpœnas issue from this Honorable Court directed to John Ridout, Charles H. Merillat, Abbot E. Jones, Elizabeth Jones, his wife, Frank P. Reeside, Joseph R. Edson, Charles B. Bailey, the National Metropolitan Citizens' Bank, of Washington, D. C., Percival M. Brown, Trustee, and Charles W. Clagett, Trustees, requiring them to appear and answer the exigencies of this bill upon a day certain.

2. That a decree be passed by this Honorable Court establishing that the title to the real estate hereinabove described was in Abbot E. Jones before the deed of trust, dated, to wit, the tenth day of January, 1899, and executed by Abbot E. Jones and Elizabeth Jones,

his wife, to said Ridout and Williamson, Trustees, was recorded, and that the said title is and has been in the said Jones ever since that time.

11 3. That a decree be passed by this Honorable Court establishing a lien upon said real estate in favor of your complainant superior to the rights of the general and judgment creditors of said John Ridout, and of the rights of Charles H. Merillat, the Trustee in bankruptcy of John Ridout.

4. That a Trustee or Trustees be appointed by this Honorable Court to sell said real estate and to bring the proceeds into Court to abide the further decree of this Honorable Court.

5. That a Trustee or Trustees be appointed to sell said real estate, and after paying all the costs and expenses of this suit and said sale, to pay to your complainant the amount of her said lien and to pay the balance over to the Trustee in Bankruptcy of said John Ridout.

6. And for such other and further relief as the nature of the case may require, and as to the Court may seem meet and just.

LOUISA A. CROSBY,
By Her Solicitor, Chas. W. Clagett.

CHAS. W. CLAGETT,
Solicitor for the Complainant.

Demurrer.

Filed January 17, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

LOUISA A. CROSBY
vs.
JOHN RIDOUT ET AL. } Equity. No. 25,416.

The defendant, Charles H. Merillat, trustee, not confessing or acknowledging all or any of the matters and things in the said

12 amended bill contained to be true in manner and form as the same are therein set forth, does demur and for cause of demurrer shows:—

1. That the complainant has not in and by her said amended bill stated any such case as doth or ought to entitle her to any such relief as is therein prayed for against this defendant.

2. That complainant has been guilty of laches.

3. For want of any equity in the bill, as amended.

4. Because this court is without jurisdiction to entertain the cause of action, as set up by said amended bill.

Wherefore and for divers and other errors and imperfections in the said amended Bill of complaint contained, this defendant demands the judgment of this court whether he shall be compelled to make any further or other answer to said amended bill or any

of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf incurred.

EARL AMBROSE,
MASON N. RICHARDSON,
Solicitors for said Defendant, Trustee.

DISTRICT OF COLUMBIA, *To wit:*

I, Charles H. Merillat, one of the above named defendants do hereby certify and make oath that the above demurrer is not interposed for delay.

CHAS. H. MERILLAT.

Subscribed and sworn to before me this 17" day of January
13 A. D. 1906.

J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM; *Ass't Cl'k.*

I hereby certify that in my opinion the above demurrer is well founded in law.

MASON N. RICHARDSON,
Solicitor for Trustee.

Decree Dismissing Bill.

Filed January 26, 1906.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

LOUISA A. CROSBY, Complainant,
vs.
JOHN RIDOUT ET AL., Defendants. } Equity. No. 25416.

Upon consideration of the demurrer of Charles H. Merillat Trustee in Bankruptcy of John Ridout, to the amended bill of complaint filed in the above entitled cause, it is this 26th day of January, 1906, adjudged, ordered and decreed:

That said Demurrer be and the same is hereby sustained; and the complainant, having elected to stand on her amended bill of complaint, it is further adjudged, ordered and decreed:

That the said Bill be and the same hereby is dismissed.

14 From the above decree the said complainant prays in open Court an appeal to the Court of Appeals of the District of Columbia, and the same is allowed her, and it is ordered:

That the said complainant has leave to deposit with the Clerk of this Court the sum of twenty-five ($25.00) dollars in lieu of a bond for costs upon such appeal.

THOS. H. ANDERSON, *Justice.*

O. K.
RICHARDSON.

Memorandum.

January 29, 1906.—$25.00 deposited in lieu of appeal bond.

15 *Opinion of Justice Anderson.*

Filed February 10, 1906.

CROSBY *vs.* RIDOUT. } Equity. No. 25416.

The bill in this case is filed against the trustee in bankruptcy of John Ridout and others, to establish an equitable lien in favor of complainant upon certain real estate in the possession of the trustee and for the enforcement of such lien, when so established, by sale of the real estate.

The bill alleges that in January 1899, complainant placed $1500 in the hands of Ridout for investment; that on January 12, 1899 Ridout advised complainant that he had loaned the money to defendant Jones and placed on record a deed of trust given by Jones to secure the $1500, and Ridout handed her a note made by said Jones and purporting to be secured by said deed of trust in which Ridout and Irving Williamson were named as trustees; that later on Ridout also sent complainant the deed of trust, the same being dated January 10, 1899 and recorded January 11, 1899 in the Land Records of this District; that on January 10, 1899, when said deed of trust was given Ridout was himself the owner of the real estate upon which it operated, and continued to own the same until the appointment of his trustee in bankruptcy, who has since his appointment *held and now holds the possession of the real estate above described;* that, prior to the execution of said deed of trust, Ridout (his wife joining with him)

16 executed a fee simple deed of the real estate to Jones, but that through inadvertence or oversight the deed was not recorded and it was subsequently lost or destroyed; that all these facts and circumstances created a right in favor of complainant to have an equitable lien established upon the property; that subsequently to the recording of said deed of trust, the defendant, The Citizens National Bank recovered judgment against Ridout, upon which judgment, however, no execution has ever been issued and levied, and further that the judgment was rendered within four months of the time of the filing of the petition in bankruptcy and is, it is asserted, consequently, of no effect as against complainant's right to the establishment of the lien claimed by her.

The defendant Merillat trustee has demurred to the bill, and the case is before the Court upon such demurrer.

[On the margin:] Hitz *vs.* Jenks 185 U. S. 166.

The first question to be determined is, whether this court, as a court of equity, has jurisdiction to entertain a bill to establish an equitable lien upon real estate in the possession of a trustee in bankruptcy, and enforce the lien, when so established, by sale of the real estate.

Manifestly, this court can not decree a sale of real estate which is in the possession of another Court. Wiswall *v.* Sampson, 14 How. 68.

White *v.* Schloert, 178 U. S. 542. *In re* Watts and Sachs, 190 U. S. 1. Russell *v.* Burkitt, 3 Am. Bankr. Rep. 660. Consequently, no relief in the way of a sale of the real estate can be given complainant in this case.

Has this Court jurisdiction, however, to entertain the bill for the single purpose of establishing the equitable lien claimed?

17 If it has, the fact that it is without jurisdiction to grant complainant the other relief prayed for will not in anywise affect the disposition of the present demurrer; for it is well settled that where a bill makes out a case for *any relief*, even though the relief prayed for is too broad,—the demurrer must be overruled. Vol. 6 Enc. of Pl. & Pr. 418, 419. Complainant contends that the establishment of the lien claimed by her will not interfere with the custody of the bankruptcy court over the real estate, and that, therefore, she is entitled to maintain her bill for that purpose alone; and the case of Russel *v.* Burkitt, 3 Am. Bankr. Rep. 660, holding that the fact that a trustee in bankruptcy has taken possession of property does not prevent an action being maintained in another court against the trustee in trover or trespass, is cited. The defendant trustee contends, on the other hand, that since a suit for the establishment of a lien is a proceeding *in rem* and not an action *in personam* like trover or trespass, this Court is without jurisdiction to entertain a bill for such purpose against real estate which is in the custody of a bankruptcy court; and two cases are cited to the proposition that the assertion of any right against, or to participate in, the property of any bankrupt must be sought in the Court, in whose custody it is. In Carter *v.* Hobbs (U. S. District Court for the District of Indiana, decided March 11, 1899), 1 Am. Bankr. Rep. 224, one of the cases cited, it was said—

"The assertion of any right against, or to participate in, the *res*, so *in custodia legis*, must be sought in the Court in whose custody it is. An attempt to assert such right elsewhere would be regarded as a contempt."

18 And *in re* Coffin (U. S. District Court for the Eastern District of Texas, decided Sept. 11, 1899) 2 Am. Bankr. Rep. 349, 350, the other case cited, it was said—

"The assertion of any right against, or to participate in the property of the bankrupt must be sought in the Court in whose custody it is. In the opinion cited (Carter *v.* Hobbs) it is also said: 'It would seem to be clear that the District Court when sitting in Bankruptcy has lawful jurisdiction over liens and mortgages of the property of the bankrupt, and that it may inquire into their validity and extent, and grant the same relief, which the Courts of the State might or ought to grant, and that such Court may do this without the consent of the secured creditor."

Whatever may be the exclusive jurisdiction of the bankruptcy Court over the determination of the validity and extent of liens already established, it would certainly seem reasonable that no other Court ought to entertain jurisdiction of a suit for the *establishment of a lien* against real estate, which has regularly passed to the bankruptcy Court and is in its custody. It is quite different from an action *in*

personam. It operates upon the *res* itself, and, under the bankruptcy law, the bankruptcy court must be held to have exclusive jurisdiction over the determination of claims asserted against the *res.* If the bankruptcy court did not have complete and exclusive authority in this connection, its adminstration of the affairs of estates, including the sale and disposition of property, would be subject to innumerable delays and embarrassments while other courts were passing upon questions affecting the right to the same.

Nor can this Court take jurisdiction of the case simply because it is alleged that the lien sought to be established by the complainant has priority over the lien claimed by the defendant Bank under its judgment or over the dower right of the bankrupt's wife.
19 The bankruptcy court has the same authority, in administering the affairs of the real estate, to determine the *extent* of liens and claims asserted against the same as it has to determine whether the same should be established at all.

While this question of jurisdiction is not altogether free from doubt, yet the conclusion reached would seem to be the proper one under the present bankruptcy law.

Nor is the further question presented by the demurrer as to whether,—in view of Sec. 67 of the Bankruptcy law providing—

"Liens.—*a.* Claims which for want of record or for other reason would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

and Sec. 499 of the D. C. Code (re-enacted from Act of April 29, 1878, 1 Supp. R. S. 315) making unrecorded instruments affecting real estate void as against "creditors,"—a case is made out here for the establishment of the lien claimed, altogether free from doubt. On the part of the defendant trustee it is contended that the complainant's claim of lien was not sufficiently recorded, because the person who executed the deed of trust was a stranger to the record title; and, in support of that general proposition, the cases of Texas Lumber Co. *v.* Branch, 60 Fed. 201 (Circuit Court of Appeals, Fifth Circuit, decided Feb. 13, 1894), and Oliphant *v.* Burns, 146 N. Y., 233, are cited. It is contended, however, on the part of the complainant that, since one of the parties to the deed of trust Ridout (as a trustee agreeing with the maker of it to carry out its provisions) was the holder of the record title, the recording of that deed
20 of trust constituted a sufficient record of her *claim of lien.*

As the demurrer however will have to be sustained for want of jurisdiction, as already indicated, it would not be proper to decide this question which arises upon the merits of the case itself.

THOS. H. ANDERSON, *Justice.*

21 *Directions to Clerk for Preparation of Record.*

Filed January 29, 1906.

In the Supreme Court of the District of Columbia.

LOUISA A. CROSBY, Complainant,
vs.
JOHN RIDOUT ET AL., Defendants. } In Equity. No. 25416.

To the Clerk of said Court:

We hereby designate, to be included in the record on appeal the following papers in the above entitled cause, the same being all of the record in said cause which we deem necessary to the determination of the questions to be presented to the Court of Appeals on appeal:

1st. Amended Bill of complaint filed in said cause on the 16th day of January, 1906.

2nd. Demurrer to the amended bill of complaint filed in said cause on the 17th day of January, 1906.

3d. Decree dismissing the amended bill of complaint and allowing an appeal filed in said cause on the 26th day of January, 1906.

4th. The opinion of the Court filed in said cause.

5th. A statement that the deposit required by the decree allowing the appeal has been made with the Clerk of the Court.

CHAS. W. CLAGETT,
Attorney for Plaintiff.
MASON N. RICHARDSON,
Attorney for Defendant Charles H. Merillat, Trustee, etc.

22 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 21, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 25,416, equity, wherein Louisa A. Crosby is complainant and John Ridout, *et al.* are defendants, as the same remains upon the files and of record in said Court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 13″ day of February, A. D. 1906.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1646. Louisa A. Crosby, appellant, *vs.* John Ridout *et al.* Court of Appeals, District of Columbia. Filed Feb. 16, 1906. Henry W. Hodges, Clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

MAR 28 1906

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1906.

LOUISA A. CROSBY,
Appellant
vs.
JOHN RIDOUT,
CHARLES H. MERILLAT,
Trustee, et al.,
Appellees.
} No. 1646.

BRIEF FOR APPELLANT.

CHARLES W. CLAGETT,
PERCIVAL M. BROWN,
Solicitors for Appellant.

MILANS, LAW PRINTER, 615 E STREET, N. W., WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia.

LOUISA A. CROSBY,
Appellant

vs.

JOHN RIDOUT, CHARLES H. MERILLAT, TRUSTEE, ET AL.,
Appellees.

No. 1646.

STATEMENT.

In the month of January, 1899, the appellant, Louisa A. Crosby, employed John Ridout, at that time an Attorney at Law engaged in active practice in this District, to invest for her upon good real estate security, the sum of fifteen hundred ($1500.00) dollars, and placed the said sum of money in his hands to be so invested; on the 12th day of January, 1899, said Ridout advised the appellant that he had loaned said money to Abbott E. Jones and had secured the same by a deed of trust from said Jones and wife on part of lot twelve (12) in square seven hundred and twenty-four (724) in this District, and he forwarded to her a promissory note executed by said Jones, dated the tenth day of January, 1899, for the sum of $1,500.00, said note purporting on its face to be secured by a deed of trust on said real estate from said Jones and wife to John Ridout and Irving Williamson, Trustees; that said Ridout also forwarded to her a receipt from the Recorder of Deeds of this District for said deed

of trust, which was in fact recorded by said Ridout on the 11th day of January, 1899, and a certificate of title made by said Ridout as Attorney for appellant, whereby he certified over his signature that the title to said real estate was good in Abbott E. Jones, subject only to the deed of trust from said Jones and wife, to secure appellant the said sum of $1,500.00; that the interest on said note was regularly paid up to the tenth day of January, 1905, and that no interest has been paid since that date.

That on the 10th day of January, 1899, and ever since that date, until the 24th day of January, 1905, when the defendant, Merillat, was appointed Trustee in Bankruptcy for said Ridout, the record title to said real estate instead of being in said Jones as represented by said Ridout, was in said Ridout; that since the appointment of said Merillat as Trustee for said Ridout, said Trustee has been collecting the rents and profits from said real estate.

That Abbott E. Jones and wife never had any beneficial interest in said real estate, but that said Jones held the legal title thereto, as hereinafter more particularly set out; that the said sum of $1,500.00 placed by appellant in the hands of Ridout for investment, was retained by him, and that the interest on said money was paid by Ridout.

That prior to the date of the conveyance by Abbott E. Jones and wife to Ridout and Williamson, Trustees, of said real estate to secure appellant, said Ridout and wife conveyed said real estate to said Jones, but through some inadvertence or oversight the deed was not recorded; that appellant has made diligent inquiry to find said deed, but without success, and has been advised by said Ridout, that it was left with him for record, but has

been lost or was destroyed by a fire which occurred in the Fendall Building, where said Ridout's offices were, and which destroyed many valuable papers in his possession.

That there are two methods of searching title in this District, one by examining the indices of the land records by names and thereafter examining the deeds to which said names refer, and the other by examining every conveyance affecting a particular lot; that a person examining the land records would have found recorded the above deed of trust from said Jones to said Ridout and Williamson, trustees, and would have found that prior to said deed of trust the title to said real estate was in Ridout, and that Abbott E. Jones had conveyed to Ridout as trustee property owned by said Ridout for the purpose of securing appellant the sum of $1,500; that all persons dealing with said real estate and all judgment and general creditors had notice and were put on inquiry concerning appellant's interest in said real estate, and are estopped to deny that appellant has a lien upon said real estate superior to the lien of all judgment creditors of said Ridout since the said deed of trust from Jones and wife was recorded, and superior to the rights of the general creditors of said Ridout, and of his trustee in bankruptcy.

That the facts above set out created a lien such as a court of equity will render certain.

That on the 16th day of March, 1905, said Williamson and Ridout, as trustees, said Ridout and wife, in their own right, said Jones and wife, and the appellant joined in a deed whereby they conveyed the real estate hereinabove described to Clagett and Brown, trustees, for the purpose of correcting certain omissions in the record occurring through inadvertence, and certain defects and

imperfections in the title to the said real estate conveyed under the deed of trust hereinabove referred to by Jones and wife to Ridout and Wiliamson; that in said deed Ridout and Williamson resigned as trustees under said deed of trust from Jones, and Clagett and Brown were substitued as such trustees, the said real estate being conveyed to them upon the uses and trusts set forth in the said deed of trust from Jones and wife; that appellant joined in said deed solely for the purpose of consenting to the substitution of trustees; that said conveyance to Clagett and Brown, Trustees, vested in them for the benefit of the appellant and inchoate dower interest of Frances E. Ridout (wife of John Ridout) in said real estate. On the 15th day of October, 1904, the Citizens National Bank of Washington, recovered a judgment in the Supreme Court of this District against said Ridout, and on the 11th day of October, 1904, the said Bank recovered another judgment in the same Court against said Ridout; that said judgments are subject to and inferior to the lien of your appellant upon said real estate; that said judgments were recovered within four months prior to the adjudication of said Ridout as a bankrupt and are void. That executions issued on said judgments and were levied upon a large amount of real estate in this District owned by said Ridout which was of great value, but the real estate herein described was not levied upon under said execution, and that no further proceedings were taken, because of the bankruptcy of said Ridout, to enforce said judgments; that if it should be held that the Trustee in bankruptcy of said Ridout can preserve and avail himself of the liens of said judgments as against this appellant under Section 67f of the National Bankruptcy Act, then in that event this appellant is en-

titled to have all the real estate owned by said Ridout at the date of said judgments, and all the personal estate owned by him at the time said writs of execution were placed in the hands of the Marshall for the District of Columbia, marshalled to ascertain the equitable proportion of said judgment which the real estate hereinabove described should bear.

The bill prays that a decree be passed establishing that the title to said real estate was in Abbott E. Jones before the deed of trust dated the 10th day of January, 1899, made by Abbott E. Jones and wife to Ridout and Williamson, was recorded, and that said title has been ever since said time and is now in said Jones; that a decree be passed by the Court establishing a lien upon said real estate in favor of the appellant superior to the rights of general and judgment creditors of said Ridout and to the rights of the trustee in bankruptcy of said Ridout; that a trustee be appointed to sell said real estate and pay appellant the amount of her lien, and a prayer for general relief.

A demurrer was filed by Merillat, trustee in bankruptcy for said Ridout, to the amended bill of complaint which was sustained by the Court and said bill dismissed.

Assignments of Error.

1. It is submitted that the Court below erred in sustaining said demurrer and in dismissing the amended bill of complaint.

Argument.

In the Court below appellant's solicitor expressly waived all the relief prayed, except such as would ascertain her lien upon the real estate mentioned. Appellant only asks

this Court to determine whether she has a lien upon said real estate and the extent thereof. She expressly waives all other relief prayed for.

If the appellant is entitled to have her lien established, the demurrer is bad and the cause should be reversed.

See Enc. of Pl. and Pr., Vol. 6, 418–419, and cases cited.

The Court below dismissed the bill because in its opinion a bill to make certain a lien against real estate is a proceeding *in rem*, and that as the bill alleges that the trustee in bankruptcy was collecting the rents and profits from the real estate, it must be held to be in the possession of the Bankruptcy Court, and that no other Court had jurisdiction. It will be observed, however, that the Bankruptcy Act itself makes provision for the adjudication of controversies at law and in equity between trustees in bankruptcy and adverse claimants concerning property acquired or claimed by trustees. The Bankruptcy Act contains the following:

> "Sec. 23. *Jurisdiction of the United States and State Courts.* The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees in the same manner and to the same extent only as though bankrutpcy proceedings had not been instituted, and such controversies had been between the bankrupt and such adverse claimants."

Even if this bill to establish a lien is in a certain sense a proceeding *in rem* (which is denied) Congress has ex-

pressly provided that the controversies between a trustee and adverse claimants as to property *acquired* or *claimed* by the trustee shall be adjudicated in other courts. In carrying this intention out the courts do not violate the well settled doctrine that where a court has the actual physical possession of property no other court will deprive such court of its custody.

They only determine questions of *title*, leaving the possession of the property in the Bankruptcy Court, to be there administered in accordance with the legal and equitable rights of the parties as judicially determined in any proper proceeding.

In Bardes *vs.* The Bank, 178 U. S., 526, which was a suit by the trustee in a Bankruptcy Court to recover property from an adverse claimant, the court after itemizing the jurisdiction of Bankruptcy Courts, held that the District Court had no jurisdiction over suits brought by a trustee in bankruptcy to assert title to property of the bankrupt against strangers to the bankruptcy proceedings; that Congress "by the second clause of Sec. 23 of the present Bankruptcy Act appears to this Court to have clearly manifested its intention that controversies not strictly or properly part of the proceedings in brankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts. * * * One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined for the most part in the local Courts of the State, to the greater economy and convenience of litigants and witnesses." (P. 538.)

Since the above decision an amendment has been made to the Brankruptcy Act, but this amendment does not deprive State Courts of jurisdiction, but possibly confers like jurisdiction upon the District Courts.

A suit for the exclusive purpose of defining the lien of the appellant upon certain property, and which does not endeavor to interfere with the custody of the property is not a proceeding *in rem.* It is a proceeding to determine the *title* of the property.

A proceeding *in rem* is commenced by a seizure of the res under the process of the court.

> "If the defendant appears the cause becomes mainly a suit *in personam* with the added incident that the property attached remains liable under the control of the Court to answer any demand which may be established against the defendant by the final judgment of the Court, but if there is no appearance and no service of process on him, the cause becomes in its essential nature a proceeding *in rem.*"
>
> Cooper *vs.* Reynolds, 77 U. S., 308.

In Hollingsworth *vs.* Barbour, 4 Peters, 466, the Justice, delivering the opinion, says that:

> "A decree in chancery for the conveyance of land has never yet, within my knowledge, been held to come within the principles of proceedings *in rem* so far as to dispense with the service of process upon the party. There is no seizure nor taking into custody of the court of the land so as to operate as constructive notice."

In the case of Bar all the parties interested are parties to the suit having been brought in by personal service. Even if the cause had been in its inception a proceeding

in rem, upon all the parties being actually served with process, under the decision of Cooper *vs.* Reynolds, it becomes a proceeding *in personam.*

Substantially all the authorities hold that under the Bankruptcy Act the State Courts have jurisdiction to determine questions of *title* to property in the possession of the Trustee, provided the proceedings are not such as will deprive the Bankruptcy Court of the custody of the property. In Crosby *vs.* Spear, 98 Me. 542, the court held that a suit cannot be maintained in a State Court to take property out of the possession of the Bankruptcy Court, but an adverse claimant may bring suit in the State Court and try the *title* to property; that the State Court has concurrent jurisdiction of all questions of *title* to property derived through the Bankruptcy preceedings and that a party claiming the same can pursue any remedy to which he is entitled that does not involve a withdrawal of the property from the custody of the Court.

In an action of trover against the Trustee in Bankruptcy, Blodgett, C. J., says:

> "The question raised by the agreed facts is not one of replevin but of trover. It concerns not the judicial custody or lawful possession of the property in controversy, but only the trial of the *title* to it. The jurisdiction conferred on the Federal Courts in actions of this character between the trustees in Bankruptcy proceedings is not exclusive, but on the contrary it is well settled that in all questions of *title* to property derived through such proceedings, the State Court has concurrent jurisdiction.
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> Truda *vs.* Osgood, 71 N. H., 185.
> *In re* Spitzer, 12 Am. B. R., 347.

In re Russell and Burkett, 3 Am. B. R.,, 656.
In the matter of Kouter and Cohen, 9 Am. B. R., 372.
In re Teschmacher and Brazay, 11 Am. B. R., 547.
Heath *vs.* Shaffer, 93 Fed., 647.
Goodrich *vs.* Wilson, 119 Mass., 429.
McCormick *vs.* Page, 96 Ill. App., 447.
In re Kane, 131 Fed., 386.
In re Young, 111 Fed. 158 (C. C. A.)

"It was the intention of Congress to permit such controversies (between adverse claimant and trustees) when they could not be settled by compromise or arbitration to be litigated in the courts which under the general rule would have jurisdiction of them. The Bankruptcy Court controls the Trustee, supervises administration of the trust, settles his accounts, and orders the distribution of the money in his hands, but is not required to assume all the litigation necessary for the collection of the assets, nor are adverse claimants of property acquired or claimed by the trustees, to be put to unnecessary inconvenience in litigating their rights, (628)." The controversy was remitted to the State Court.

Hicks *vs.* Knost, 94 Fed., 625.

An adverse claimant should have the right to test his *title* in the State Court, where the question as to the construction of the State Statutes properly belongs.

In re Johnston, 127 Fed., 618.
In re Flynn Company, 126 Fed., 422.
In re Mundle, 14 Am. B. R., 680.

Where the equitable lien was acquired more than four

months before the adjudication in bankruptcy it is valid against the trustee and the State Court has authority to enforce it.

In re English, 10 Am. B. R., 133.
Hilyer *vs* Leroy, 12 Am. B. R., 733.

Where the lien was acquired four months prior to the filing of the petition in bankruptcy the State Courts have jurisdiction to enforce the lien irrespective of the Bankruptcy Act.

Metcalf *vs.* Barbour, 187 U. S., 165.

In this case the lien of appellant was acquired in 1899 when her money was advanced on the faith of the property in suit, and she was assured by its owner that her loan had been properly secured on said property.

In Eyster *vs.* Gaff, 91 U. S. 521, Mr. Justice Miller says:

> "The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the District Court which has so adjudged, draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other Court, except in so far as the Circuit Courts have concurrent jurisdiction and that other Courts can proceed no further in suits in which they had at that time full cognizance, it was a prevalent practice to bring any person who contested with the assignee any matter growing out of the disputed rights of property or of contracts into the Bankruptcy Court by the service of a rule to show cause and to dispose of their rights in a summary way. This Court has steadly set its face against this view.

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, looses none of those rights by the bankruptcy of his adversary.
>
> "The same Courts remain open to him in such contests, and the statute has not divested those Courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the State Courts."

This language is quoted witht approval by Mr. Justice Gray in the case of Bardes *vs.* The Bank, 178 U. S., 524, in passing upon the present bankruptcy law.

White *vs.* Schloerb, 178 U. S, 541, was an action of replevin brought in a State Court to recover possession of certain goods in the possession of the trustee. The Supreme Court, following a long line of decisions, held that the property could not be taken out of the possession of the bankruptcy court, by replevin, and distinquishes the case from the line of cases above cited as follows: "The question certified concern, not the trial of the *title* to these goods, but only the judicial custody and lawful possession ot them." In this case the Supreme Court impliedly admits that the doctrine laid down in numerous State and federal courts, to the effects that any proceedings can be brought against the Trustee in the state courts for the purpose of trying the title to property in his possession, provided it does not deprive the Bankruptcy Court of the actual custody of the property.

Trustee in Bankruptcy Take Property Subject to Prior Equitable Liens.

Under the present bankruptcy law and all preceding bankruptcy laws, the trustee in bankruptcy took the

property of the bankrupt subject to all equities, liens and encumbrances existing against it in the hands of the bankrupt, except in cases where by the law of the state the lien is void for want of record.

In re Bozeman, 2 Am. B. R., 809;
In re Ohio Co-operative Shear Company, 2 Am. B. R., 775;
In re George W. McCay, 1 Am. B. R., 292;
In re Wright, 96 Fed., 187;
In re Gressler, 136 Fed., 754;
Windsor *vs.* McLellan, 2 Story, 493.

"The established rule is that except in cases of attachment against the property of the bankrupt within the prescribed time preceding the commencement of proceedings in bankruptcy (within four months under the present Bankruptcy Act), and except in cases where the disposition of property of the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or encumbrances, whether created by operation of law or by act of the bankrupt, which exist against the property in the hands of the bankrupt."

Yeatman *vs.* N. O. Savings' Institute. 95 U. S., 764.
Stewart *vs.* Plat, 101 U. S., 739.

It is a well-settled rule in equity that a trustee of a bankrupt takes his estate subject to every equitable claim which exists against it in favor of a third person and that he cannot avail himself of the legal estate thus acquired to defeat a prior equity, even if he had no notice thereof prior to the assignment.

In re Oliver, 12 AM. B. R., 695.
Bank *vs.* Rome Iron Works, 102 Fed., 755.
Hardin *vs.* Osborne, 94 Ill., 575.
Exchange & Deposit Bank *vs.* Stone, 80 Ky., 121.
In re Howe, 1 Paige, 125.
Hack *as.* Hill, (Mo.) 14 S. W., 741.
Bridgeford *vs.* Adams, 45 Ark., 143.

In the case of Cook *vs.* Tullis, 18 Wallace, 332, the bankrupt had purchased for Tullis certain bonds which were left in his possession. Subsequently, without knowledge of the owner, he substituted a mortgage for the bonds and shortly afterwards went into bankruptcy. The Court said : "The assignees took the property of the bankrupt subject to all legal and equitable claims of others. They were effected by all the equities which could be urged against him." There have been numerous decisions to the same effect under the present bankruptcy law. The Circuit Court of Appeals, in an opinion delivered by Wallace, Judge, considered carefully the provisions of the present bankruptcy law in reference to the title which the trustee took as against those holding equitable liens. The Court said :

> "The Bankrupt Act does not vest the trustee with any better right or title than belonged to the bankrupt or his creditors at the time when the trustee's title accrued. The present Act, like all preceding Bankruptcy Acts, contemplates that a lien good at the time as against the debtor and as against all of his creditors, shall remain undisturbed. * * * We think these provisions ought not to be extended by construction to cover cases which are not distinctly within their terms for the purpose of subverting liens which have originated in good faith."

In re N. Y. Economical, Etc., Co., 110 Fed., 514;
Hewet *vs.* Berlin Machine Works, 194 U. S., 296;
Thompson *vs.* Fairbanks, 196 U. S., 527;
First National Bank *vs.* Pa. Trust Co., 124 Fed., 968 (C. C. A.);
Crane *vs.* Pneumatic Signal Company, 94 App. Div. N. Y., 53.

Certain wagons were sold under conditions which created a chattel mortgage. The mortgage was not recorded. Proceedings in bankruptcy were instituted and the trustee brought suit to recover the property mortgaged as belonging to the bankrupt's estate. The Court held that the contract between the seller and the bankrupt was a chattel mortgage, and was valid regardless of its want of registration as against all parties except lien creditors and subsequent bona fide purchasers or mortgagees. "It is true that the bankruptcy law condemns all alleged liens which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, but this was a valid lien."

Hall *vs.* Keating, etc., Co., 77 S. W. R., 1054 (Tex. Ct. of Civil App.)
Meyer Bros. Drug Co. *vs.* Pipkin Drug Co., 136 Fed., 398.

Facts Stated in the Bill Create an Equitable Lien.

Ketchum *vs.* St. Louis, 101 U. S., 306.
Fourth St. National Bank *vs.* Yardley, 165 U. S., 634.

Walter *vs.* Brown, 165 U. S., 654, (L. C. P. Co., Supr. Ct.. R., Book 41, p. 865) where will be found a very full note on equitable liens.

Hume *vs.* Riggs, 12th App., D. C., 355.

Mr. Justice Shepard in Hume *vs.* Riggs, 12 App. D. C., 355, says :

> " Unless precluded by the terms of some statute expressly intended to change it, the rule has always prevailed that an equity under a trust or a contract *in rem* is superior to that under a judgment lien. The claimant, under a contract in rem has an equity to the specific thing which binds the conscience of his grantor, while the judgment creditor who has advanced nothing on the faith of the specific thing, is entitled only to that which his debtor really has at the time or could honestly convey or encumber; his beneficial interest and nothing more."

Dyson *vs.* Simmons, 48 Md., 207.
Valentine *vs.* Seiss, 79 Md., 187.
In re Howe, 1 Paige Ch., 125.

Notice of Appellant's Equitable Lien.

We submit upon the foregoing authorities that the equitable lien of Mrs. Crosby in this case is superior to the liens of judgment creditors, general creditors and the trustee. The circumstances as stated in the bill were such as to put the whole world upon notice as to Mrs. Crosby's right in the property. Whatever is sufficient to put a person upon inquiry is notice in equity, provided

that if the inquiry had been pursued, the knowledge of the equitable lien would have been acquired.

Ringgold *vs.* Bryan, 3 Md. Ch., 494.

The recording of the deed of trust, conveying Ridout's property to himself as trustee to secure the appellant was an awakening circumstance which put all the world upon notice.

Recording Acts.

Although recording acts in terms may make unrecorded liens void as to bona fide purchasers and creditors. The term "creditors" refer to such as have procured a specific liens.

In re Schmidt, 109 Fed., 267.
In re Shirley, 112 Fed., 301.
24 Am. and Eng. Enc., 2d Ed., 126, and cases cited.

In Hume *vs.* Riggs supra, this Court seems to have modified the rule above laid down to the extent that such lien is nor prior to the rights of such creditors, who relying on such property, have dealt with the apparent owner since such lien originated.

An equitable lien never is recorded and is not required to be recorded by the Recording Acts, because it grows out of facts which give a lien, but no provision is made for recording such facts and they cannot be recorded.

Chattanooga National Bank *vs.* Rome Iron Works, 102 Fed., 755.

As the lien in this case does not come within the provisions of the Recording Act it falls within the general principle that equitable liens are superior to the liens of judgment and general creditors.

Marshalling Assets.

In the case of Thompson *vs.* Fairbanks, 196 U. S., 527, the Supreme Court held that an attachment procured within four months of the bankruptcy could not be availed of by the trustee for the purpose of defeating a mortgage; That under the Bankrupt Act it was necessary for the trustee to obtain an order of the Bankruptcy Court allowing him to take advantage of such lien and that such an order had not been granted. Such an order has not been granted in this case and considering the circumstances, equity and good conscience require that it shall not be granted. If, however, the Bankruptcy Court should pass an order preserving the liens of the judgments in favor of the Citizens National Bank, and if it shall further appear that the Bank advanced its money on the faith of the property mentioned in this bill, it is submitted that appellant will be entitled to have all the estate of the bankrupt marshalled for the purpose of ascertaining what proportion of said judgements shall be paid out of the property upon which Mrs. Crosby claims her lien.

In re N. Y. Economical Printing Co., 110 Fed. 514.

Where a creditor has a lien on two funds out of which he can satisfy his debt, and a subsequent creditor has a lien on one of the funds only, the first creditor must re-

sort to the fund which the second creditor cannot reach, in order that the second creditor may avail himself of his only security, provided it may be done without injury to the prior creditor.

Breed *vs.* National Bank, 57 App. Div. (N. Y.), 475 affirmed without opinion in 171 N. Y. 648.

Boone *vs.* Clark, 129 Ill. 480.

Pomeroys Eq. Jur., Vol. 1, Sec. 396 and 411, Vol. IV, Sec. 1414, Vol. III, Sec. 1222, 3d Ed.

Respectfully submitted,

CHAS. W. CLAGETT,

PERCIVAL M. BROWN,

Solicitors for Appellant.

Henry W. Hodges
& L

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1906.

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LOUISA A. CROSBY, APPELLANT,

vs.

JOHN RIDOUT, CHARLES K. MERILLAT, TRUSTEE, ET AL., APPELLEES.

BRIEF FOR APPELLEE MERILLAT.

MASON N. RICHARDSON,
EARL AMBROSE,
Solicitors for Merillat, Trustee.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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BRIEF FOR APPELLEE MERILLAT.

Statement of the Case.

The essential facts are that the complainant filed her amended bill in this cause on the 16th January, 1906 (the original bill filed May 12, 1905), in which she alleges that in January, 1899, she employed John Ridout to invest for her $1,500, which sum she placed in his hands for that purpose, and she received from him a note secured by a deed of trust on lot 12, square 724, executed by Abbot E. Jones and Elizabeth Jones, dated 10th January, 1899; and under this deed of trust Irving Williamson and John Ridout were named as trustees. This deed was at that time recorded. She also received a certificate of title from Ridout, showing the record title good in Jones, subject only to this trust; that

said Jones never had any beneficial interest in said property, nor any record title thereto (Rec., p. ——).

That at the time of the filing of said deed of trust and up to the time of the filing of the bill the record title to said property was in John Ridout, who had the record title when Charles E. Merillat was appointed trustee of his estate in bankruptcy (Rec., p. 3).

John Ridout was declared a bankrupt, Charles H. Merillat duly appointed his trustee February 24, 1905. That thereafter and since his said appointment as trustee, said Merillat has been collecting the rents and profits from the said property (Rec., p. 3, par. 4, of the bill).

That on the 15th day of October, 1904, and on the 11th of November, 1904, and within four months of the adjudication of John Ridout a bankrupt, judgments were recovered against him for the sums, respectively, of $2,501 and $2,713 (Rec., 5–6).

That subsequently, on March 16, 1905, the dower right of Frances E. Ridout in the property was conveyed to Clagett and Brown, trustees, for the use of complainant.

To this amended bill a demurrer was filed on the following grounds:

(1) That the amended bill failed to disclose any right to equitable relief; (2) that complainant has been guilty of laches; (3) because the equity court is without jurisdiction to entertain the cause of action.

A hearing being had on the demurrer, the bill was dismissed.

ARGUMENT.

One ground of the demurrer is that the bill is without equity, the complainant in fact being guilty of laches, in failing to sooner assert an equitable lien, prior to the vesting of other rights.

Section 499 of the Code of Law for the District of Columbia provides that as to *creditors* and subsequent bona fide purchasers, and mortgagees without notice of said deed, and others interested in said property, a deed shall only take effect from the time of its delivery to the recorder of deeds for record.

Under the bankruptcy law the trustee stands in the place of the general creditor. Upon the adjudication he takes title to all property of the bankrupt which, prior to the filing of the petition, the debtor could by any means have transferred or which might have been levied upon and sold under judicial process against him (sec. 70, 5, bankruptcy law).

In this cause the recorded deed of trust was executed by a stranger to the record title, and no attempt having been made to establish an equitable lien by complainant prior to the time of the adjudication and the appointment of the trustee in bankruptcy, up to that time Ridout, the bankrupt, himself could have transferred this property to an innocent purchaser for value, free and clear of the claim of the complainant, now for the first time attempted to be asserted, or the same might have been levied upon and sold under judicial process against him. The title to this property therefore passed to the trustee, as an asset of the estate, and the trustee took the property for the benefit of the general creditor.

Cutler *vs.* Huston, 158 U. S., 423.

Ohio Nat. Bank *vs.* Berlin, Wash. Law Rep., vol. 33, No. 46, pp. 726–8.

Lynch *vs.* Murphy, 161 U. S., 247.

The creditors in this case, under the adjudication in bankruptcy, through the trustee in bankruptcy, and under the provision of the law above quoted, had acquired or fastened a lien upon the property, and are, therefore, *protected* creditors under the terms of the law, having

established a lien prior to notice under section 499 of the Code in respect of the recordation of deeds, above quoted.

> "Sec. 499. When deeds to take effect. Any deed conveying real property in the District, or interest therein, or declaring or limiting any use or trust thereof, executed and acknowledged and certified as aforesaid, and delivered to the person in whose favor the same is executed, shall be held to take effect from the date of the delivery thereof, except that as to creditors and subsequent bona fide purchasers and mortgagees without notice of said deed, and others interested in said property, it shall only take effect from the time of its delivery to the recorder of deeds for record."

In this connection it will also be observed that it is provided by section 67 (*a*) of the bankruptcy law as follows:

> "Claims which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

As stated, the mere state of the record in the office of the recorder of deeds, a deed by a stranger to the title, did not amount to a valid lien in respect of the equitable claim of the petitioner, and no attempt was made to establish it as a claim of record, prior to the filing of this suit. In the meanwhile the rights of the creditors intervened, and the section above quoted becomes operative.

As stated In re Booth's estate, 98 Fed. Rep., 975–6:

> "On the same date, the bankrupt being indebted to the said Fischer, in the further sum of $600, gave a second promissory note for that amount, and as security therefor, executed and delivered to the claimant a chattel mortgage upon the steam launch, then under construction by the maker of the note. The chattel mortgage was not filed for record nor was there any record of the bond, or other notice of either of these instruments. The

> referee found against the claim of the lien, and such finding is approved. The bankrupt act provides that claims which for want of record or other reasons would not have been valid liens as against the claim of creditors of the bankrupt shall not be liens against his estate. These liens could have been maintained against a purchaser of the property for value without notice. In other words this property is property which the bankrupt might have transferred free from the claims of liens *to any purchaser not having notice.* And it is not claimed in this case that there was any actual notice of the existence of these liens. *The trustee of the bankrupt's estate stands in the position of a purchaser for value without notice.*"

Abbot E. Jones was a stranger to the record title, and the placing of the deed of trust upon record by him conveying the property in question was not notice, actual or constructive, to any one.

Texas Lumber Co. *vs.* Branck, 60 Fed. Rep., 201–203.

In re New Y. Economical Printing Co., 110 Fed. Rep., 518.

Oliphant *vs.* Burns, 146 N. Y., 233.

Lynch *vs.* Murphy, 161 U. S., 247.

In Newton Savings Bank *vs.* Lawrence et al., 71 Conn., p. 365, it is said:

> "Had there been no proceedings in insolvency, the creditors of Lawrence could have attached this land, and by levy of execution appropriated it to the payment of their several claims. This right of creditors to so avail themselves of this property has been suspended by the appointment of a trustee in insolvency. New Haven Wire Co. Cases, 57 Conn., 352–387."

See, also—

Kellogg *vs.* Kelly, 69 Minn., 127.

Bayne *vs.* Brewer Pottery Co., 90 Fed. Rep., 755–6.

Where the creditor is protected the assignee is protected. See—

In re Leigh, 2 Am. Bank Rep., 606.

While the trustee has acquired a lien upon the property greater than that of the equity of the complainant for the reasons stated, yet he has for another reason acquired a lien superior to that of the equitable claim now attempted to be asserted by the complainant. The bill alleges that within four months of the adjudication judgments were obtained against John Ridout, bankrupt, in the sums, respectively, of $2,501 and $2,713.

Section 67 (f) of the bankruptcy law provides that such judgments—

> "shall be null and void in case he is adjudged a bankrupt . . . *unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate.*"
>
> "If the creditor by an execution or a creditor's bill has secured a lien or equitable lien upon the mortgaged property before the mortgagor has been adjudicated a bankrupt under this provisions his right will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceedings, his lien will inure to his own exclusive benefit, but if acquired at any time within the four months it would be null and void under subdivision (f) of the section, *except as preserved for the benefit of the estate as provided in that subdivision and in subdivision b.*"

110 Fed. Rep., 518.

It is nowhere asserted that the property described in the bill is of a greater value than the amount of the lien of these judgments, or that the debts of the bankrupt's

are less than the value of this property. Hence no equity is asserted in respect of a supposed surplus, and no occasion for a marshaling of assets. There being no allegation of a surplus, section 10 of the bill can not be taken to be such an averment, because the deed of trust referred to is not made a part of the record, except by reference. Under the rules of the Supreme Court of the District of Columbia, if the statements of the deed are material they should be attached as exhibits to the bill. The inspection of the deed might disclose the fact that other and additional property is mentioned in the deed; and the bill fails to show that the debts of the bankrupt are less than $20,000, or any other sum. In fact, as to this the bill is silent.

It is further contended by the appellant that the bill has standing in equity, because the proceedings in bankruptcy can assert no right against the dower interest of the wife of the bankrupt in the property in question. But it is submitted that this dower right is not vested in the complainant, but in trustees, under the terms of a deed not before the court, except by reference. Therefore the complainant herself is not in a position to claim any equity in respect of an interest in the dower right. The title to assert that claim, if any, is, as far as can be gathered from the record, in the trustees. But it is a sufficient answer to say that the bankruptcy court has full jurisdiction to protect the right of dower. The equity court can not take jurisdiction of the case simply because it is alleged that the lien sought to be established by the complainant has priority over the lien claimed over the dower right of the bankrupt's wife. The bankrupt court has the same authority, in administering the affairs of the real estate. to determine the *extent* of liens claimed or claims asserted against the same as it has to determine whether the same shall be established at all.

Another ground of demurrer is that the equity court is without jurisdiction.

Proceedings having been instituted in bankruptcy, in which John Ridout was declared a bankrupt, and Charles H. Merillat appointed trustee of his estate on the 24th of February, 1905, and the trustee having taken possession of the property in respect of which relief is sought prior to the filing of the bill, in which for the first time is set out the equitable right or claim of the complainant, equity is without jurisdiction to grant the relief sought, because another tribunal, the District Court, sitting in bankruptcy, has actually assumed jurisdiction and fastened upon the *rem*. The property is in the possession of the bankruptcy court.

Hitz *vs.* Jenks, 185 U. S., 160.
Wiswall *vs.* Sampson, 14 How., 68.
White *vs.* Schloert, 178 U. S., 542.
In re Watts and Lochs, 190 U. S., 1

Carter *vs.* Hobbs, 1 Am. Bank Rep., 224, in which it is said:

> "The assertion of any right against or to participate in, the *res*, so in custodia legis, must be sought in the court in whose custody it is. An attempt to assert such a right elsewhere would be regarded as a contempt."

And In re Coffin, 2 Am. Bank. Rep., 349, 350, it was said:

> "The assertion of any right against or to participate in the property of the bankrupt must be sought in the court in whose custody it is. In the opinion cited, Carter *vs.* Hobbs, it is also said: 'It would seem to be clear that the District court when sitting in bankruptcy has lawful jurisdiction over liens and mortgages of the property of the bankrupt and that it may inquire into their

> validity and extent and grant the same relief, which the courts of the States might or ought to grant, and that such court may do this without the consent of the secured creditor.'"
>
> Russel *vs.* Burkitt, 3 Am. Bankr. Rep., 660.

Whatever may be the exclusive jurisdiction of the bankruptcy court over the determination of the validity and extent of liens already established, it would certainly seem reasonable that no other court ought to entertain jurisdiction of a suit for the establishment of a lien against real estate which has regularly passed to the bankruptcy court and is in its custody. It is quite different from an action in person. It operates upon the res itself, and, under the bankruptcy law, the bankruptcy court must be held to have exclusive jurisdiction over the determination of claims asserted against the res. If the bankruptcy court did not have complete and exclusive authority in this connection, its administration of the affairs of estates, including the same and disposition of property, would be subject to innumerable delays and embarrassments, while other courts would be passing upon questions affecting the right to the same.

For these reasons it is respectfully submitted that the bill was properly dismissed.

Respectfully submitted.

MASON N. RICHARDSON,
EARL AMBROSE,
Solicitors for Merillat, Trustee.